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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RICARDO ANTHONY PEREZ, Defendant and Appellant.	E066390 (Super.Ct.No. INF500899) OPINION

APPEAL from the Superior Court of Riverside County. Samuel Diaz, Jr., Judge. Affirmed.

Richard Jay Moller, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson, Lynne G. McGinnis, and Kristine A. Gutierrez, Deputy Attorneys General, for Plaintiff and Respondent.

After a jury trial, defendant and appellant Ricardo Anthony Perez received a two-year prison term for stealing two vehicles and evading and resisting arrest. He argues the People presented insufficient evidence that either of the vehicles was worth more than $950, and so his felony convictions for violating Vehicle Code section 10851 must be reduced to misdemeanors. We affirm.

FACTS AND PROCEDURE

On November 4, 2014, the voters approved Proposition 47, The Safe Neighborhoods and Schools Act (Proposition 47); it went into effect the following day. Proposition 47 reduced certain nonserious, nonviolent felonies to misdemeanors. It added and amended sections of the Penal Code. Penal Code section 1170.18[1] was added and provides that a person currently serving a sentence for a felony conviction, whether by trial or plea, who would have been guilty only of a misdemeanor had Proposition 47 been in effect at the time the plea was entered, or at the time of trial, may petition for a recall of the sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing.

A few days later, on November 9 and 10, 2014, defendant took or drove a 1998 Nissan Sentra and a 1997 Isuzu. Each vehicle was stolen from the victim while it was parked in front of the same apartment building on successive evenings. Defendant drove and ran away from police on two separate occasions when they attempted to arrest him.

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[1] Section references are to the Penal Code except where otherwise indicated.

On September 25, 2015, the People filed an information charging defendant in count 1 with evading a police officer (Veh. Code, § 2800.2), in counts 2 and 3 with unlawfully taking or driving a vehicle (Veh. Code, § 10851, subd. (a)(1)), and in count 4 with misdemeanor resisting arrest (Pen. Code, § 148, subd. (a)(1)).

On May 13, 2016, the jury found defendant guilty on all counts.

On July 1, 2016, the court sentenced defendant to two years in state prison, consisting of the low term of 16 months on count 1, eight months on count 3, and concurrent terms on counts 2 and 4.[2]

Defendant appealed.

DISCUSSION

1. Sufficiency of the Evidence

Defendant argues that the evidence was insufficient to support his conviction for unlawfully driving or taking a vehicle as a felony because the prosecution failed to establish the value of the car. He claims that the prosecution made no attempt to establish that the value of the car exceeded $950 in order to qualify the offense as a felony; therefore, this court should find that the theft was a misdemeanor. We conclude that the felony conviction is supported by substantial evidence.

"We often address claims of insufficient evidence, and the standard of review is settled. 'A reviewing court faced with such a claim determines "whether, after viewing

[2] Defendant was sentenced on several other cases as well, for a total of four years eight months in prison.

the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." [Citations.] We examine the record to determine "whether it shows evidence that is reasonable, credible and of solid value from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt." [Citation.] Further, "the appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." ' [Citation.]" (*People v. Moon* (2005) 37 Cal.4th 1, 22.)

"The elements necessary to establish a violation of section 10851 of the Vehicle Code are the defendant's driving or taking of a vehicle belonging to another person, without the owner's consent, and with specific intent to permanently or temporarily deprive the owner of title or possession." (*People v. Windham* (1987) 194 Cal.App.3d 1580, 1590 (*Windham*); see Veh. Code, § 10851.)

Here, the prosecution established all the elements necessary to show a violation of Vehicle Code section 10851. (*Windham*, *supra*, 194 Cal.App.3d at p. 1590.) Contrary to defendant's position, the prosecution was not required to establish the value of the car as an element of the crime. Thus, the evidence is sufficient to support the jury's verdict that defendant violated Vehicle Code section 10851.

Defendant argues that Proposition 47 applies here, and that, absent evidence at trial that either vehicle was worth more than $950, this court should reduce his Vehicle Code section 10851 convictions to misdemeanor petty theft under Penal Code section 490.2. As he acknowledges, the California Supreme Court is currently reviewing

whether a felony conviction for violating Vehicle Code section 10851, subdivision (a), may be reduced to misdemeanor petty theft under Proposition 47.[3] Until the California Supreme Court rules on the question, we will adhere to the view that a felony conviction for violating Vehicle Code section 10851 does not require the prosecution to prove beyond a reasonable doubt that the vehicle had a value exceeding $950.

This case differs from the above-noted cases in that defendant did not file a petition under section 1170.18 to have his pre-Proposition 47 felony conviction reduced to a misdemeanor. Rather, defendant was sentenced *after* Proposition 47 established that theft of property worth $950 or less should be a misdemeanor under Penal Code section 490.2. We find no legal support for adding as an element of the crime of felony driving or taking a vehicle that the vehicle had a value of more than $950.

Proposition 47 provides retrospective relief for defendants who are either serving a sentence or have completed a sentence for a prior conviction, if the prior conviction would have been a misdemeanor under Proposition 47 "had [it] been in effect at the time of the offense." (Pen. Code, § 1170.18, subds. (a) & (f).) In this case, Proposition 47 was in effect at the time of the offense. However, defendant is not entitled to relief under Proposition 47. Vehicle Code section 10851 is a "wobbler" offense, punishable either as a felony or a misdemeanor. (Veh. Code, § 10851, subd. (a); see *People v. Superior Court*

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[3] *People v. Page* (2015) 241 Cal.App.4th 714, review granted January 27, 2016, S230793; *People v. Haywood* (2015) 243 Cal.App.4th 515, review granted March 9, 2016, S232250; and *People v. Ortiz* (2016), 243 Cal.App.4th 854, review granted March 16, 2016, S232344.

(*Alvarez*) (1997) 14 Cal.4th 968, 974, fn. 4 [listing Vehicle Code section 10851, subdivision (a), as a statute that provides for "alternative felony or misdemeanor punishment"].) The statutory language setting the punishment for violations of Vehicle Code section 10851 remains the same, before and after Proposition 47. Further, Vehicle Code section 10851 is not included among the enumerated sections amended or added by Proposition 47. (Veh. Code, § 10851, subd. (a); see Pen. Code, § 1170.18, subd. (a).) Thus, defendant's conviction for violation of Vehicle Code section 10851 did not require the prosecution to prove the vehicle was worth more than $950.

Defendant argues Proposition 47 applies to the offense of unlawfully taking or driving a vehicle because it is a lesser included offense of Penal Code section 487, subdivision (d), and that offense is a misdemeanor under Penal Code section 490.2. We disagree. Proposition 47 added Penal Code section 490.2, which provides: "Notwithstanding Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor, . . ." (Pen. Code, § 490.2, subd. (a).) Penal Code section 490.2 is listed in Penal Code section 1170.18 as one of "those sections [that] have been amended or added" by Proposition 47. (Pen. Code, § 1170.18, subd. (a).) Penal Code section 490.2 redefines a limited subset of offenses that would formerly have been grand theft to be petty theft. However, "[a] person can violate [Vehicle Code] section 10851[, subdivision] (a) 'either by taking a vehicle with the intent

to steal it or by driving it with the intent only to temporarily deprive its owner of possession (i.e., joyriding).'" (*People v. Garza* (2005) 35 Cal.4th 866, 876 (*Garza*).) In other words, Vehicle Code section 10851 proscribes the action of taking or driving a vehicle "with or without intent to steal." (Veh. Code, § 10851, subd. (a).) Therefore, depending on circumstances, a violation of Vehicle Code section 10851 may or may not be treated as a "theft conviction" for certain purposes. (*Garza*, at p. 871.) It therefore does not fall within the scope of Penal Code section 490.2

We conclude that the prosecution was not required to establish the value of the car as an element of a felony violation of Vehicle Code section 10851, and that the evidence is sufficient to support the jury's guilty verdict.

2. Equal Protection

Finally, defendant argues that, under equal protection principles, defendants who merely drive or take a vehicle with the intent to temporarily or permanently deprive the owner under Vehicle Code section 10851 should be afforded the same relief afforded under Penal Code section 490.2 to those who actually steal a vehicle under Penal Code section 487, subdivision (d)(1). We disagree.

Applying rational basis scrutiny, the California Supreme Court has held that "neither the existence of two identical criminal statutes prescribing different levels of punishments, nor the exercise of a prosecutor's discretion in charging under one such statute and not the other, violates equal protection principles." (*People v. Wilkinson* (2004) 33 Cal.4th 821, 838.) Similarly, it has long been the case that "a car thief may not

complain because he may have been subjected to imprisonment for more than 10 years for grand theft of an automobile [citations] when, under the same facts, he might have been subjected to no more than 5 years under the provisions of section 10851 of the Vehicle Code." (*People v. Romo* (1975) 14 Cal.3d 189, 197.) The same reasoning applies to Proposition 47's provision for the possibility of sentence reduction for a limited subset of those previously convicted of grand theft (those who stole an automobile or other personal property valued $950 or less), but not those convicted of unlawfully taking or driving a vehicle in violation of Vehicle Code section 10851. Absent a showing that a particular defendant " 'has been singled out deliberately for prosecution on the basis of some invidious criterion,' . . . the defendant cannot make out an equal protection violation." (*Wilkinson*, at p. 839.) Defendant here has made no such showing.

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

I concur:

FIELDS
J.

I concur in the judgment only:

SLOUGH
J.